

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

ULYSSES TORY, ET AL., :
Petitioners :
v. : No. 03-1488
JOHNNIE L. COCHRAN, JR. :

- - - - -X

Washington, D.C.
Tuesday, March 22, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:15 a.m.

APPEARANCES:
ERWIN CHEMERINSKY, ESQ., Durham, North Carolina; on behalf
of the Petitioners.
JONATHAN B. COLE, ESQ., Sherman Oaks, California; on
behalf of the Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
ERWIN CHEMERINSKY, ESQ.	
On behalf of the Petitioners	3
JONATHAN B. COLE, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
ERWIN CHEMERINSKY, ESQ.	
On behalf of the Petitioners	49

P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 03-1488, Ulysses Tory v. Johnnie L. Cochran. Mr. Chemerinsky.

ORAL ARGUMENT OF ERWIN CHEMERINSKY

ON BEHALF OF THE PETITIONERS

MR. CHEMERINSKY: Good morning. Mr. Chief Justice, and may it please the Court:

The injunction in this case violates the most basic principles of the First Amendment. It's a prior restraint. It's a content-based restriction on speech. It's vastly overbroad. It even restricts the speech of those who are not a party to the lawsuit, such as Petitioner Ruth Craft.

The injunction in this case is inconsistent with this country's unique and profound commitment that speech by public officials and public figures be open, robust, and uninhibited.

One way in which the injunction is clearly unconstitutional is in restricting the speech of those who are not a party to the lawsuit. For example, Ruth Craft is expressly restrained from ever speaking again about Johnnie Cochran even though she was never named as a party to the lawsuit. And, in fact, Cochran's attorney admitted

1 at the beginning of trial, she wasn't a part of the
2 lawsuit.

3 JUSTICE SOUTER: How about you? You're in
4 trouble too, aren't you?

5 (Laughter.)

6 MR. CHEMERINSKY: Yes, I am, Your Honor. This
7 injunction is so broad that if I talk about Johnnie
8 Cochran or this case on the sidewalk in front of this
9 Court or pass out copies of the brief or speak to any
10 reporter, I am violating the terms of the injunction and I
11 could be held in contempt of court.

12 JUSTICE GINSBURG: Mr. Chemerinsky, you speak
13 about the injunction, and the injunction has three parts.
14 I thought that you were not challenging -- at least the
15 question presented doesn't suggest you're challenging --
16 the first one that concerns distance, the 300 yard from
17 Cochran or his place of business, and the third one, which
18 is an anti-harassment provision. Do I understand
19 correctly that it is only the second one that you're
20 challenging?

21 MR. CHEMERINSKY: No, Your Honor. The question
22 presented is that the injunction is unconstitutional.

23 One of the reasons why the injunction is
24 unconstitutional is that it's based on speech that's
25 protected by the First Amendment. All of the statements

1 that were uttered by Mr. Tory are opinion protected by the
2 First Amendment. There is not the requisite actual
3 malice. And so it's our position that the injunction
4 itself is unconstitutional.

5 JUSTICE GINSBURG: But your question is
6 preventing all future speech about an admitted public
7 figure, and the first and third provisions of this
8 injunction do not prohibit all future speech.

9 MR. CHEMERINSKY: Yes, Your Honor, that's
10 correct. It's our position, though, that the injunction
11 is based on speech that's protected by the First
12 Amendment, and we believe that the question presented is
13 that the injunction is impermissible in its restriction of
14 speech.

15 JUSTICE O'CONNOR: But that isn't what you've
16 said in the question presented. Why shouldn't we be
17 limited to answering the question presented? And that
18 would leave the other parts there.

19 MR. CHEMERINSKY: Well, of course, you're
20 limited to the question presented. Our position, though,
21 is that the injunction in its restriction of speech is
22 unconstitutional. And one of the reasons why the
23 injunction is unconstitutional is that all of the speech
24 that occurred in this case is speech that's protected by
25 the First Amendment.

1 JUSTICE O'CONNOR: Yes, but you understand
2 Justice Ginsburg's question surely, and I would imagine
3 that even if you prevail, nothing we would order would
4 affect the first and third parts.

5 MR. CHEMERINSKY: Well, Your Honor, certainly we
6 believe that the injunction is most clearly
7 unconstitutional in its overbreadth.

8 We believe also and separately the injunction is
9 unconstitutional because injunctions are not a permissible
10 remedy in a defamation case, especially concerning public
11 officials and public figures.

12 But it's also our position that the injunction
13 is based on speech that's protected by the First
14 Amendment, and thus, the injunction violates the First
15 Amendment.

16 JUSTICE SCALIA: Well, but that doesn't --

17 JUSTICE O'CONNOR: Mr. Chemerinsky, is it true
18 that your client intends to go on defaming Mr. Cochran?

19 MR. CHEMERINSKY: No, Your Honor. We don't
20 believe our client has ever defamed Mr. Cochran. We
21 believe that all of his speech is just opinion.

22 JUSTICE O'CONNOR: Does he intend to continue
23 making the same comments that he made before?

24 MR. CHEMERINSKY: His exact words were that
25 perhaps he would continue to express his view that Mr.

1 Cochran owes him money.

2 JUSTICE O'CONNOR: All right. Now, let me ask
3 you this. Under your theory, if -- if the defendant is
4 judgment-proof, does respondent have any remedy at all if
5 the statements are defamatory?

6 MR. CHEMERINSKY: Yes, Your Honor.

7 JUSTICE O'CONNOR: What is it?

8 MR. CHEMERINSKY: There is, of course, a remedy.
9 Since we're dealing here with a public figure, there is
10 the remedy of expressing views which this Court has said
11 in Gertz v. Welch is available to a public figure. There
12 is a damage judgment that's available. Certainly, Your
13 Honor, there can't be a different rule --

14 JUSTICE O'CONNOR: But if -- if the defendant is
15 judgment-proof, what good does that do?

16 MR. CHEMERINSKY: Your Honor, there is a damage
17 judgment that forever would be available against the
18 person. And it cannot be, Your Honor, that those who are
19 poor will have injunctions --

20 JUSTICE KENNEDY: Well -- well, your -- your
21 answer should be to Justice O'Connor there is no effective
22 legal remedy under your theory of the case.

23 MR. CHEMERINSKY: No, Your Honor, I disagree
24 with that.

25 JUSTICE KENNEDY: I mean, you -- you say he has

1 the remedy of -- of counter-speech. We're talking --
2 that's really that doesn't answer the question. The
3 question is, is there anything he can get from the courts
4 other than a damage remedy, and your answer I think is no.

5 MR. CHEMERINSKY: That's correct, Your Honor.
6 From the courts, he can get a damage remedy but I don't
7 accept that a damage remedy is inadequate just because a
8 person may be poor. The damage remedy will be that they'd
9 be collected for the person who gets assets in the future.

10 Also, as I was saying to Justice O'Connor, it
11 can't be --

12 JUSTICE KENNEDY: Well, it -- it seems to me
13 that that really avoids the problem -- the problem.

14 So suppose we disagree with you about that.
15 Then it's true that there is no -- there is no legal
16 remedy that he can get.

17 MR. CHEMERINSKY: But then, Justice Kennedy, it
18 can't be the rule that poor people have their speech
19 enjoined, but those with assets can continue to speak in
20 the future.

21 JUSTICE SCALIA: Well, it also can't be the rule
22 that poor people can defame ad libitum and -- and people
23 who have money cannot. I mean, that's -- that's not a
24 fair rule either.

25 MR. CHEMERINSKY: No, Your Honor, but that's why

1 there would be, of course, the ability of a court to issue
2 a damage judgment. There are many instances in which
3 damage judgments can't be collected.

4 JUSTICE SCALIA: It's worthless against a --
5 against a person who has no assets.

6 MR. CHEMERINSKY: But that's true everywhere in
7 the legal system, Your Honor.

8 And I would also argue here that none of Mr.
9 Tory's statements were defamatory. I would point --

10 JUSTICE GINSBURG: That's another one that is in
11 your brief. You say that these were statements of opinion
12 not fact. But that surely is not presented in your
13 question. You -- you don't -- there were findings made
14 that these statements were defamatory, and your question
15 presented does not seem to me to encompass at all the
16 question whether these statements were defamatory.

17 MR. CHEMERINSKY: I would disagree, Your Honor.
18 The question presented is whether this injunction, the
19 forever stops speech, violates the First Amendment. One
20 reason why --

21 JUSTICE SCALIA: Not -- not this injunction.
22 The question presented is whether a permanent injunction
23 as a remedy in a defamation -- in a defamation action,
24 preventing all future speech about an admitted public
25 figure, violates the First Amendment. There's no

1 suggestion in that wording that you claim that in this
2 particular case there was no defamation. I -- I just
3 don't think it's fairly included within the question.

4 MR. CHEMERINSKY: Your Honor, what I am saying
5 is that the question presented does ask whether this
6 injunction, which permanently restricts speech --

7 JUSTICE SCALIA: No, it doesn't. It says
8 whether a permanent injunction as a remedy in a defamation
9 action preventing all future speech about an admitted
10 public figure violates the First Amendment.

11 MR. CHEMERINSKY: We would argue --

12 JUSTICE SCALIA: There's nothing about this
13 particular injunction which is based upon speech that is
14 not defamation. There's nothing in there about that.

15 MR. CHEMERINSKY: Your Honor, our position is
16 that question asks whether an injunction violates the
17 First Amendment, and certainly it is about this case. And
18 our position is that all of the speech that was expressed
19 in this case is opinion. And it's important --

20 JUSTICE BREYER: All right. Now, if that's
21 so --

22 JUSTICE KENNEDY: Well -- well, there really --
23 there are findings against you, and to say that a lawyer
24 is a crook, a liar, and a thief and you're trying to tell
25 us that that's not defamatory, I mean, I -- I think we

1 should just proceed on -- on some other basis for this
2 argument. We have other questions to discuss.

3 MR. CHEMERINSKY: Sure. But, Your Honor, I want
4 to just respond to that. The exact statement there was --
5 and I'll quote it for you and it is on page 54 of the
6 joint appendix. Johnnie is a crook, a liar, and a thief.
7 Can a lawyer go to heaven? Luke 11:46. Your Honor, this
8 Court has said, for example, in Greenbelt Cooperative that
9 charging somebody with blackmail is expressing opinion.
10 In Letter Carriers v. Austin this Court said calling
11 somebody a traitor is opinion.

12 JUSTICE BREYER: All right. That -- that --
13 what you've quoted many -- much of this I wouldn't repeat
14 in polite company. You've reported one of the most mild,
15 and in fact there are two findings. One, this is not just
16 defamation. It was an action for defamation, as well as a
17 tort of invasion of privacy. And there is a finding,
18 first, that this was done intentionally to create a
19 negatively charged and ominous environment, and this is
20 not a matter of speech-related issues. It is simply the
21 use of false and defamatory and privacy-invading
22 communications, or worse, or attempt to improperly coerce
23 payment of money in tribute for -- for desisting from that
24 type of activity. All right. Now, those are the
25 findings against you.

1 So suppose I agreed with you hypothetically that
2 that, with all these findings, is nonetheless protected by
3 the First Amendment. All right? Now, suppose, in other
4 words, you convince me of that. Now, I want to know how
5 to write my opinion on that assumption to protect what I
6 was worried about yesterday, that a woman who has a
7 boyfriend or a husband is being continuously harassed in
8 -- with methods similar to this one. It's easy to
9 transpose those two cases which are both on my mind.

10 And I want to know if in your opinion that these
11 restraining orders, which try to prevent this kind of
12 thing, among others, are unconstitutional, if there's a
13 way of distinguishing them, if you could possibly win on
14 what theory. And what I'm trying to get you to do is to
15 say is it absolute. Are there limits? If so, what?

16 MR. CHEMERINSKY: I would suggest three
17 different ways in which you could write the opinion that
18 distinguished the case.

19 The first is that this injunction is vastly
20 overbroad, that even if there can be an injunction to say
21 that Ulysses Tory and Ruth Craft can never again say
22 anything about Johnnie Cochran in any public forum, that I
23 can never speak about Johnnie Cochran would violate the
24 First Amendment.

25 A second way of distinguishing is that

1 defamation is different, that when the First Amendment was
2 adopted, the clear history was that above all it was to
3 prevent prior restraints, and that injunctions were not
4 permitted in defamation actions. That's quite different
5 than a harassment action.

6 And third, as I've argued, what makes this
7 different is the basis for this injunction is speech
8 protected by the First Amendment.

9 With regard to the findings that you referred
10 to, you mentioned two.

11 The first is invasion of privacy. Your Honor,
12 the only privacy claim in this case was false light
13 invasion of privacy. California law is clear. When there
14 is a defamation action and a false light claim, the false
15 light claim is automatically dismissed as duplicative when
16 it's based on the same fact.

17 The second basis you pointed --

18 CHIEF JUSTICE REHNQUIST: Mr. Chemerinsky, this
19 case comes up to us from a California appellate court.
20 Surely they know California law better than we do.

21 MR. CHEMERINSKY: Yes, Your Honor, but they did
22 not base their decision on the privacy claim because
23 California law is clear that when it's false light
24 invasion of privacy brought together with a defamation
25 action, the false light claim is dismissed. That's a

1 California case, Couch v. San Jose Unified School
2 District.

3 CHIEF JUSTICE REHNQUIST: Well, we're not going
4 to debate among ourselves over what California law is.

5 MR. CHEMERINSKY: No, Your Honor. All I'm
6 saying is it's important to be clear about what the
7 privacy claim is. As I was saying to Justice Breyer,
8 there may be privacy claims that give rise to injunctions.
9 Harassment claims may give rise to injunctions, but not
10 the privacy claim in this case which was just about false
11 light, which even the California Court of Appeal admitted
12 is treated together with defamation.

13 JUSTICE KENNEDY: Suppose this picketing had
14 taken place in front of his house, every day in front of
15 his house.

16 MR. CHEMERINSKY: Your Honor, under Frisby v.
17 Schultz, that would be a different situation. Under
18 Frisby v. Schultz, this Court said --

19 JUSTICE KENNEDY: All right. Well -- well, then
20 this -- this argument you're making, oh, never, never, the
21 sky is falling and so forth, I -- I think we have to be
22 more precise here. I think if it were in front of his
23 house, it would be different.

24 If he had alleged \$10 worth of monetary damages,
25 it would be disparaging the quality of his services, which

1 would be a trade libel, and the Restatement at least -- I
2 don't know California law -- says that you -- would you
3 agree that you can enjoin a trade libel --

4 MR. CHEMERINSKY: Well, Your Honor --

5 JUSTICE KENNEDY: -- that disparages quality of
6 goods to the serious injury of a -- of a business?

7 MR. CHEMERINSKY: Actually, Your Honor, the vast
8 majority of cases have held that you cannot have an
9 injunction for product defamation. And so I think while
10 that's a different and more difficult question, most
11 courts have said no even there.

12 And Your Honor, I'm not saying there can never
13 be injunctions. But I am saying that this Court has said
14 there's a very strong and heavy presumption against
15 injunctions, and that never, not once in the 214-year
16 history of the First Amendment, has this Court ever upheld
17 an injunction as a remedy in a defamation action.

18 And, Your Honor --

19 JUSTICE GINSBURG: Well, if -- if this under --
20 the underlying claim seems to be that Mr. Cochran is
21 essentially being blackmailed; that is, this -- this --
22 your client wants tribute to go away. And you say, yes,
23 but it's defamation. It's a defamation action.
24 Therefore, damages is the only remedy.

25 Is there nothing that one can do to stop another

1 from engaging in blackmail?

2 MR. CHEMERINSKY: Yes, Your Honor, there is. If
3 this was blackmail or extortion, Johnnie Cochran could
4 have filed a criminal complaint with the police. He could
5 have civilly sued for blackmail or extortion. But, Your
6 Honor, this wasn't extortion.

7 JUSTICE KENNEDY: What kind of a jurisprudence
8 is it that a person can go to jail but that he's freed
9 from an injunction? I mean, why -- why do we do this?

10 MR. CHEMERINSKY: Well, Your Honor, that's
11 because this Court has said that injunctions of speech are
12 even worse than criminal penalties. I would refer this
13 Court --

14 JUSTICE KENNEDY: But -- but why -- is that true
15 in every case? I mean, take the timid person who's not
16 sure -- I know the law doesn't protect the timid person in
17 the first area, but let's -- let's assume the timid person
18 is not sure. So he wants -- he wants to get an equitable
19 ruling first, declaratory judgment. He -- and he would
20 take an injunction. That's certainly much easier than
21 going to jail.

22 MR. CHEMERINSKY: But, Your Honor, I'd remind
23 you of this Court's language in the Vance v. Universal
24 Amusement where the Court said presumption against prior
25 restraints is heavier and the degree of protection broader

1 than against limits on criminal penalties.

2 JUSTICE KENNEDY: I know, but I'm asking you why
3 that -- why that should be. If -- if you asked a person
4 not familiar with our jurisprudence, which is worse,
5 having an injunction that you can argue about or going to
6 jail, I -- I think they would say that going to jail is
7 worse.

8 MR. CHEMERINSKY: But, Your Honor, in terms of
9 the First Amendment, there are reasons why an injunction
10 has always been regarded as worse.

11 JUSTICE BREYER: Always? Do you want to apply
12 that to an harassment action too against a woman who has
13 the restraining order? No restraining orders in divorce
14 cases in case they're against speech because even if
15 violence is threatened, even if -- et cetera. I mean, how
16 -- how far do you want to push that principle?

17 MR. CHEMERINSKY: Your Honor, I don't want to
18 push the principle at all to harassment. I believe that
19 injunctions are completely appropriate in harassment
20 actions. I think it is quite important to note that the
21 California harassment statute expressly excludes speech
22 which is protected by the First Amendment as being a basis
23 for harassment.

24 The history of the First Amendment is different.
25 To go back to Justice Kennedy's question, it's always been

1 thought that an injunction strikes at the very heart of
2 the First Amendment because, as Justice Scalia pointed
3 out --

4 JUSTICE SCALIA: Why can't we say that speech
5 that is -- is being used for extortion is different, just
6 as speech which is being used for harassment is different?
7 And just as you can get an injunction for the latter, you
8 ought to be able to get an injunction for the former. Not
9 all speech, but only when speech is being used to -- to
10 extort money.

11 MR. CHEMERINSKY: Yes, Your Honor, there can be
12 an injunction for extortion, but this was not extortion.
13 There was never the criminal complaint. There was never
14 the civil action. And it didn't meet the requirements for
15 extortion. Your Honor, California law, Penal Code section
16 518, defines extortion as, quote, the obtaining of
17 property from another with his consent induced by a
18 wrongful use of force or fear. There wasn't the wrongful
19 use of force or fear.

20 Now, it may be that Ulysses Tory was speaking --

21 JUSTICE SCALIA: Here I think there was -- why
22 isn't there a use of fear when, you know, you're afraid of
23 this person destroying your business by calling you a liar
24 and a cheat? Wasn't Mr. Cochran afraid of that -- of that
25 happening?

1 MR. CHEMERINSKY: Your Honor, this Court is
2 required to do an independent review of the record under
3 Bose v. Consumers Union. There's no indication that Mr.
4 Cochran suffered that fear from Mr. Tory being outside.
5 It's true that Mr. Tory may have believed that he was owed
6 money by Johnnie Cochran and was also trying to encourage
7 Mr. Cochran to pay. But this Court has said in cases like
8 NAACP v. Claiborne Hardware speech does not lose its
9 protective character simply because it may embarrass
10 others or coerce them into action.

11 JUSTICE GINSBURG: Mr. Chemerinsky, the district
12 -- I mean, the trial court made certain findings and I'm
13 looking at page 42 of the joint appendix. The first is
14 that these statements were actually made for the purpose
15 of inducing Cochran to pay Tory amounts of money which
16 Tory was not entitled. That's one finding. And then
17 finding 24, despite repeated requests, Tory has refused to
18 cease picketing unless he was paid money -- a monetary
19 settlement by Cochran. And then 27 that says this is
20 simply use of false and privacy-invading communications to
21 coerce or attempt to improperly coerce payment of money in
22 tribute for desisting from that type of activity. And
23 those sound like findings.

24 It's true that the label of extortion has been
25 put on it, but it certainly does sound like the -- that

1 the purpose of the speech was to extract money not owed.

2 MR. CHEMERINSKY: But, Your Honor, since this is
3 a defamation action, not an extortion action, the rules
4 under the First Amendment for defamation have to apply.
5 Under the rules of the First Amendment for defamation,
6 injunctions are not available to public officials or
7 public figures.

8 JUSTICE KENNEDY: Well, so this finding -- the
9 court shouldn't have made these findings? It was
10 irrelevant?

11 MR. CHEMERINSKY: Well, Your Honor, I believe
12 that the --

13 JUSTICE KENNEDY: Was there an objection to the
14 testimony that established this?

15 MR. CHEMERINSKY: Yes, Your Honor. Mr. Tory,
16 who was appearing pro se in the trial court, from the very
17 outset objected that he was being held liable for speech
18 protected by the First Amendment.

19 JUSTICE SOUTER: No, but it seems to me -- and I
20 think what bothers me is -- is what bothers Justice
21 Kennedy. It seems to me that the argument you just made
22 is an argument that given the pleadings in this case, the
23 findings that Justice Ginsburg just quoted really were
24 irrelevant findings, that they should not have gotten --
25 that the court should not have gotten into extortion and

1 so on and should not have provided a remedy for extortion,
2 quite apart from the fact of whether it's an appropriate
3 remedy, constitutional or otherwise. And that, it seems
4 to me, is -- is something that we -- we are not here to
5 touch. That's a question of California law.

6 What we are here to touch is, number one,
7 whether the injunction is overbroad with respect to pure
8 speech, and maybe we are here -- that we have a question
9 about the -- the breadth of the case we took. But maybe
10 we are here to determine whether there can be an
11 injunction against blackmail or harassing activities.

12 But I -- I think we're not here to decide
13 whether California could have gotten to the question of
14 blackmail, harassment, and injunction for that. Do you
15 agree with that?

16 MR. CHEMERINSKY: No, Your Honor. I certainly
17 agree with the first point. One issue before this Court
18 is whether this injunction is overbroad, and it clearly is
19 in terms of the breadth of speech that's regulated and
20 whose regulated.

21 But as to the second point that you make, this
22 is a defamation action, and thus the issue before this
23 Court, clearly presented in the question presented, is
24 whether a permanent injunction can be issued in a
25 defamation case remedy when the plaintiff is a public

1 figure.

2 JUSTICE SOUTER: Well, it can certainly -- the
3 -- the issue is certainly before us as to whether such an
4 injunction can be issued with respect to defamation pure
5 and simple. But the findings that Justice Ginsburg has --
6 has read and part of the order in question here seems to
7 go beyond pure defamation. It goes to the kind of
8 demonstrative activity which plausibly is found to have
9 been in aid of extortion. And that, it seems to me, is an
10 entirely different question.

11 We may -- I'm not saying we will, but we may
12 agree with you that it's overbroad. We may agree with you
13 that as to pure speech, you can't enjoin it. But that
14 doesn't necessarily mean that every part of this
15 injunction is wrong, and it seems to me it is irrelevant
16 as to whether the -- the State of -- the courts of
17 California should have reached extortion.

18 MR. CHEMERINSKY: I would disagree in this way,
19 Your Honor. Bose v. Consumers Union makes clear that when
20 it is a defamation action, this Court and every appellate
21 court has to do an independent review of the record.

22 JUSTICE SOUTER: With respect to the defamation,
23 pure and simple. I agree with you. We -- there is a
24 heightened standard of review, but I don't think that
25 addresses one way or the other what the standard should be

1 when an action in the State courts has been treated as an
2 action both for defamation and for extortion or
3 harassment.

4 MR. CHEMERINSKY: But, Your Honor, it was not
5 treated here as an action for extortion or harassment --

6 JUSTICE SCALIA: Mr. Chemerinsky, let me put the
7 question this way. Suppose a State does not have a civil
8 action for extortion. It provides criminal remedies but
9 no civil action for extortion. Why does the Constitution
10 not permit us to treat, in that State at least, a civil
11 action for defamation which has within it elements of
12 distortion differently from pure defamation?

13 MR. CHEMERINSKY: Your Honor, I would say the
14 history of the First Amendment is different. A State can
15 create a civil action then for extortion at the urging of
16 this Court, but if you open the door to injunctions in
17 defamation cases, then there's the possibility that in any
18 defamation case, somebody might plead something about
19 extortion, and injunctions will not be rare but will be
20 the norm.

21 JUSTICE STEVENS: May I ask this -- may I ask
22 this question? Supposing the only thing he did was to
23 carry a sign that said Johnnie is a crook, a liar, and a
24 thief, and the trial judge finds that is false, and he's
25 carrying it in a sign, could the trial judge enjoin him

1 from carrying that sign in front of Johnnie Cochran's
2 office?

3 MR. CHEMERINSKY: No, Your Honor, because the
4 law is clear that injunctions are not a permissible remedy
5 in defamation cases.

6 JUSTICE STEVENS: What's the best authority you
7 have for that proposition?

8 MR. CHEMERINSKY: Near v. Minnesota would be the
9 best authority where this Court said clearly that
10 injunctive relief should not be awarded in a defamation
11 case.

12 JUSTICE KENNEDY: Add to Justice Stevens' -- add
13 to Justice Stevens' hypothetical that he shows that he's
14 losing some clients.

15 MR. CHEMERINSKY: But, Your Honor, even -- yes,
16 Your Honor. But I don't think that changes the
17 hypothetical in terms of enjoining the defamatory speech.

18 CHIEF JUSTICE REHNQUIST: Would you add too that
19 he's judgment-proof?

20 MR. CHEMERINSKY: Well, again, as I said to
21 Justice O'Connor, I don't think it can matter whether he's
22 judgment-proof because we can't have a different rule that
23 we allow poor people's speech to enjoin and not wealthy
24 people.

25 JUSTICE KENNEDY: You're saying -- you're saying

1 that a State cannot constitutionally prohibit someone from
2 making false statements in front of the business that
3 causes the business to lose money.

4 MR. CHEMERINSKY: Well, Your Honor, there are
5 other causes of action that may allow that. If it could
6 be --

7 JUSTICE KENNEDY: So I'm -- my question is, is
8 this constitutional to prohibit this conduct?

9 MR. CHEMERINSKY: Not in a defamation action,
10 Your Honor.

11 JUSTICE KENNEDY: That's --

12 JUSTICE GINSBURG: I --

13 JUSTICE KENNEDY: -- that's not the question.

14 JUSTICE STEVENS: But what is your authority for
15 that proposition?

16 MR. CHEMERINSKY: Well, I would say that the
17 authority comes from the fact that never in 214 years has
18 this Court ever upheld an injunction in a defamation case.

19 JUSTICE STEVENS: Have we ever set aside an
20 injunction that did that?

21 MR. CHEMERINSKY: Well, not under those facts.

22 JUSTICE STEVENS: Have we done it either way?

23 MR. CHEMERINSKY: No. That's correct, Your
24 Honor.

25 JUSTICE KENNEDY: Have we ever -- have we ever

1 considered a case where there's a strong element of
2 extortion involved?

3 MR. CHEMERINSKY: I would say yes, extortion for
4 Austin v. Keith. There was speech to pressure, and yet
5 this Court said even though the speech was to pressure,
6 it's still protected by the First Amendment.

7 I'd like to save the rest of the time for
8 rebuttal, if that's permissible.

9 CHIEF JUSTICE REHNQUIST: Very well, Mr.
10 Chemerinsky.

11 MR. CHEMERINSKY: Thank you.

12 CHIEF JUSTICE REHNQUIST: Mr. Cole, we'll hear
13 from you.

14 ORAL ARGUMENT OF JONATHAN B. COLE
15 ON BEHALF OF THE RESPONDENT

16 MR. COLE: Mr. Chief Justice Rehnquist, and may
17 it please the Court:

18 For years, Mr. Tory has relentlessly targeted
19 Johnnie Cochran with a pattern of defamatory speech in a
20 public forum for purpose of causing Mr. Cochran to pay Mr.
21 Tory money in tribute for ceasing from this unprotected
22 activity. He admitted at trial he intended to engage in
23 this conduct. He was doing it just so he could be paid
24 money, and when asked if he would continue to do so, he
25 stated he would.

1 JUSTICE SOUTER: Well, do you -- do you defend
2 the injunction in its entirety?

3 MR. COLE: Yes --

4 JUSTICE SOUTER: In other words, the -- the --
5 Mr. Chemerinsky didn't have too much chance to -- to get
6 very far into it, but one of his points was that there was
7 -- quite apart from any injunction against picketing,
8 harassment, et cetera, there was an injunction simply
9 against speech on a given subject directed to a lot of
10 people with no limit of time. With respect to that last
11 aspect, do you defend the injunction?

12 MR. COLE: Yes. First of all, I don't believe
13 it was directed to a lot of people. As this --

14 JUSTICE SOUTER: Well, it was directed, number
15 one, to a named person who was not a party to the case,
16 and it was directed to agents and employees of -- of the
17 named party. So, I -- I assume that Mr. Cochran probably
18 has a fair number of agents and employees, so it does seem
19 like a large number of people.

20 MR. COLE: I believe this Court said in Madsen
21 that that would raise an abstract controversy that Mr.
22 Tory doesn't have standing to attack the injunction for
23 other persons who are not before the court. No aider or
24 abetter has ever been served with this injunction. Ms.
25 Craft has never been served with this injunction. Only

1 Mr. Tory. So I don't believe --

2 JUSTICE SOUTER: Well, let me ask you a law
3 school question. In -- given the injunction on its face,
4 with that breadth, is that injunction defensible with
5 respect not to picketing, not to harassment, simply to
6 speech in a public place?

7 MR. COLE: I defend the injunction, and
8 respondent defends the injunction on the ground that it is
9 conduct that was being enjoined --

10 JUSTICE SOUTER: I -- I asked you --

11 MR. COLE: -- from the use of unprotected
12 speech.

13 JUSTICE SOUTER: -- to exclude the -- the issue
14 of conduct. I said forget the injunction for a moment
15 with respect to picketing, with respect to harassment, and
16 we'll say with respect to blackmail, since that has come
17 up. Forget that. Simply take the portion of the
18 injunction that enjoins speech by these people,
19 associates, agents, et cetera. On the subject matter of
20 the injunction for all time, do you defend that
21 injunction?

22 MR. COLE: Yes, we defend the injunction.

23 JUSTICE GINSBURG: Let's take specifically the
24 words of the injunction. It's against orally uttering
25 statements about Cochran, just orally uttering statements

1 about Cochran.

2 MR. COLE: Yes.

3 JUSTICE GINSBURG: You say that someone can be
4 enjoined --

5 MR. COLE: Based upon the unique facts of this
6 case, Justice Ginsburg, I say somebody can be enjoined. I
7 don't say that in the abstract.

8 JUSTICE O'CONNOR: Well, you can't square that
9 with the Near case at all. I -- I mean, the -- the
10 injunction on its face in part 2 has the appearance of
11 being overly broad.

12 MR. COLE: But in Near, they set forth certain
13 factors, and those factors included that it was not a
14 private redress of private wrongs. The information was of
15 legitimate public concern. Neither of those elements are
16 present in this action.

17 JUSTICE SCALIA: You don't know that.

18 JUSTICE O'CONNOR: You don't --

19 JUSTICE SCALIA: You don't know what future
20 speech is going to be. His future thing may be, you know,
21 Johnnie Cochran shouldn't be elected of San Francisco.
22 That would be a -- a question of public concern.

23 MR. COLE: But, Justice Scalia, what I'm relying
24 on is the fact that he has engaged in 3 years in a pattern
25 of continuing, repetitive conduct.

1 JUSTICE KENNEDY: Well, what -- what you're
2 saying is that an -- an injunction can be overbroad based
3 on past wrongful conduct. And there is simply no
4 authority for that proposition.

5 MR. COLE: I'm not suggesting that this
6 injunction is necessarily overboard based upon that
7 proposition because I believe there are --

8 JUSTICE KENNEDY: But we have just pointed out
9 that it -- that it -- it prohibits lawful, harmless,
10 truthful speech.

11 MR. COLE: I disagree with that, Justice
12 Kennedy.

13 JUSTICE O'CONNOR: Well, it does on its face. I
14 mean, it is clearly overbroad. Now, what should we do
15 about that?

16 MR. COLE: Well, if you're asking me, based upon
17 the breadth of the injunction, what I -- if -- if there
18 was -- are you asking me what I would do to modify the
19 injunction? You could merely strike -- you could leave
20 intact paragraph 2 and you could strike simply subsections
21 (ii) and (iii) as being unconstitutionally overbroad.

22 JUSTICE KENNEDY: Now, let -- let me ask you
23 about that. Let's -- let's assume, for the moment, that a
24 majority of the Court would find that some of these
25 provisions are overly broad. Is there any authority that

1 tells us what to do next? This is not like a statute
2 where we have to save the statute. Do we have any
3 obligation to save the injunction? Send it back and let
4 it be done. Let it be done all over again. I mean, why
5 -- why should we rewrite it up here? Do you have any
6 authority that requires us or permits us to do that?

7 MR. COLE: Yes. In -- in Madsen, Justice
8 Kennedy, you struck -- the Court struck certain provisions
9 as being unconstitutionally overbroad and left certain
10 intact. So there's no reason why you can't look at this
11 injunction, which clearly does not attack paragraph 1.
12 The -- they do not attack paragraph 1. They do not attack
13 paragraph 3. They only level their attack at paragraph 2,
14 and paragraph 2, by striking subsections (ii) and (iii),
15 would then be limited to the exact conduct in issue, which
16 is picketing.

17 JUSTICE BREYER: So -- so if -- before leaving
18 that point, what the injunction prohibits is that Tory and
19 those acting in concert, cooperation, or participation
20 with him from, in a public forum, orally uttering
21 statements about Cochran. All right. That's what it
22 says.

23 Now, do you think that if Tory or someone acting
24 in cooperation with him says, I've had a change of heart,
25 Johnnie Cochran is a marvelous person, and he says that on

1 television -- do you think that individual at that time
2 has violated this injunction?

3 MR. COLE: Absolutely not.

4 JUSTICE BREYER: Absolutely not. Because?
5 Because?

6 MR. COLE: First of all, that's --

7 JUSTICE BREYER: It said the words. They
8 violated the words. It was a statement, but he has not
9 violated the injunction because?

10 MR. COLE: Because I don't believe that's a
11 public forum.

12 JUSTICE BREYER: Oh, no, no. He does it in a
13 public forum. In fact, he hires Disney Hall.

14 (Laughter.)

15 JUSTICE BREYER: And moreover, he gets on stage
16 and announces it. Okay? There's no problem about a
17 public forum. So, now, why doesn't it violate the
18 injunction?

19 MR. COLE: Your -- Your Honor, I believe there
20 are alternative channels of communication here.

21 JUSTICE BREYER: No. I thought what you were
22 going to say -- but you're not. So I'm very interested in
23 that, and I'm glad I asked. I thought you were going to
24 say when it says uttering statements, it means statements
25 of the kind or identical to those we have identified

1 earlier in this opinion.

2 MR. COLE: Well, I was --

3 JUSTICE BREYER: But, now, you haven't said
4 that. I said it, and I think it's too late for you to say
5 it.

6 (Laughter.)

7 MR. COLE: I think I said it when I said there
8 was a continuing pattern of repetitive conduct under
9 Pittsburgh Press, over 3 years that that was the conduct
10 that he has engaged in. And that was clearly the purpose
11 of this injunction, Justice Breyer. We know that. And
12 the purpose of the injunction is to enjoin conduct that's
13 designed to extort money from Mr. Cochran.

14 CHIEF JUSTICE REHNQUIST: In more than one case,
15 we've said that an injunction has to be precise and clear
16 and not leaving things to the imagination.

17 MR. COLE: Well, I think this is precise and
18 clear. Based upon the breadth of the injunction, it's
19 very clear. Based upon this man's prior repetitive
20 conduct of defaming Mr. Cochran with unprotected speech
21 for the purpose of attempting to extort money from him --

22 JUSTICE SCALIA: Well, it's -- it's --

23 JUSTICE STEVENS: But nothing in the injunction
24 refers to prior conduct.

25 JUSTICE SCALIA: That's right. It's --

1 JUSTICE STEVENS: The injunction just speaks for
2 itself. It doesn't say what -- doing what you used to do
3 or anything like that.

4 MR. COLE: The injunction --

5 JUSTICE STEVENS: You cannot picket Cochran or
6 Cochran's law firm. Period.

7 MR. COLE: If we restricted the injunction to
8 specific words used such as you cannot picket Johnnie
9 Cochran's law firm and say he's a crook, liar, and thief,
10 the response will be that he'll come up with five new
11 words to defame Mr. Cochran for purposes of extorting --

12 JUSTICE STEVENS: Well, maybe there are
13 different grades of specificity. Maybe it doesn't meet
14 precisely the same words, but I think there are other ways
15 to draft it that say no picketing. Period.

16 MR. COLE: Well, there could be no picketing for
17 purposes of -- no -- which contains defamatory speech for
18 purposes of extorting Mr. Cochran. But --

19 JUSTICE STEVENS: All I'm suggesting is just
20 draft it -- just excising (ii) and (iii) from paragraph 2
21 would not necessarily solve the problem completely. Just
22 subparagraph (i) says picketing Cochran or Cochran's law
23 firm, which is a pretty broad prohibition.

24 MR. COLE: Well, I would disagree based upon the
25 prior -- continuing course of -- of repetitive conduct and

1 the fact that this -- over a period 3 years, once a week,
2 this man spent 3 to 4 hours a day of his time defaming Mr.
3 Cochran at his law office. When we enjoined him from
4 doing so at his law office, he moved it to the Los Angeles
5 Superior Court.

6 And I think the fact that Mr. Cochran is a
7 public figure actually favors the breadth of this
8 injunction. If this was not a public figure, then the
9 public forum issue would not be as effective. But because
10 Mr. Cochran is a public figure, the only way he gets
11 protection is in the public forum because this gentleman
12 could move his picketing down to west L.A., Santa Monica
13 Boulevard, nowhere near a courthouse, and to a public
14 figure he can inflict the same damage to reputation. And
15 that is the problem we were contending with in attempting
16 to draft an injunction that was not overbroad and yet
17 could control Mr. Tory --

18 JUSTICE GINSBURG: You -- you did draft this
19 injunction. It wasn't the -- an inspiration from the
20 judge unaided by your advocacy. Is that so?

21 MR. COLE: It --

22 JUSTICE GINSBURG: This -- the terms of this
23 injunction.

24 MR. COLE: Were aided -- were aided by my
25 advocacy, Your Honor.

1 CHIEF JUSTICE REHNQUIST: Aided and --

2 MR. COLE: Well said, Chief Justice Rehnquist.

3 What I'm suggesting here is Mr. Cochran would

4 have been faced with -- he has no remedy. Injunctive

5 relief is the only remedy. And he would be faced with a

6 multiplicity of actions --

7 JUSTICE SCALIA: Why? Why couldn't he just be

8 enjoined from -- from similar defamation? I mean, this --

9 this enjoins him from -- from true speech. At least he

10 could -- he could have been enjoined from in the future

11 defaming Cochran in the same manner. And if he did that,

12 then -- then he could be punished.

13 MR. COLE: I think we would be -- that

14 injunction then would be attacked on being vague or

15 ambiguous, that Mr. Tory wouldn't have sufficient notice

16 as to what he was allowed to say and not allowed to say.

17 I guarantee you that was --

18 JUSTICE KENNEDY: Well, if -- if that's so, then

19 maybe Mr. Chemerinsky is right. We -- we shouldn't have

20 injunctions. If you're saying that injunctions can't be

21 narrowly tailored, it seems to me that you're playing

22 right into the argument that the petitioner is making.

23 MR. COLE: No. I think they can be tailored. I

24 just don't think they can be that narrowly tailored. And

25 I don't think in this case, which I believe that the test

1 we should be applying if we're going to balance, is this
2 -- there's no need for this injunction to be drafted in
3 the least restrictive means.

4 I also continue to advance the argument that
5 this -- the facts of this case are unique. It's the use
6 of speech to engage in unprotected conduct. This -- this
7 conduct is not protected by the First Amendment. The
8 conduct of attempting to extort money from Mr. Cochran is
9 not protected. If that is not protected, then I believe
10 we can craft --

11 CHIEF JUSTICE REHNQUIST: You can -- you can
12 certainly have, you know, some unprotected speech in
13 connection with extortion, like give me \$5 million or I'll
14 shoot you. But that -- this was a far cry from that. In
15 other words, it isn't just addressing the victim and
16 saying give me something. It's denouncing the victim,
17 which gets into free speech here.

18 MR. COLE: It certainly does, Justice Rehnquist.
19 But what I am suggesting is there was no remedy for Mr.
20 Cochran that would have avoided a multiplicity of actions
21 other than to draft the injunction in a form that would
22 preclude Mr. Tory from engaging in the same conduct
23 without regard to whether it was -- and to let him know
24 clearly -- give him a safe harbor as to what he could and
25 could not say.

1 CHIEF JUSTICE REHNQUIST: But the injunction
2 isn't limited to the same conduct.

3 MR. COLE: But I don't think it needs to be
4 because of the pattern and practice that this man has
5 engaged in over 3 years.

6 And if we take the example, which is so he has a
7 change of heart and suddenly he now wants to praise Mr.
8 Cochran and that's become his -- and he's going to promote
9 him as mayor of San Francisco, he can certainly go into
10 the court and modify the injunction.

11 CHIEF JUSTICE REHNQUIST: I thought he lived in
12 L.A.

13 (Laughter.)

14 JUSTICE SCALIA: I think he'd like to get him up
15 to San Francisco.

16 (Laughter.)

17 MR. COLE: He can certainly seek to modify the
18 injunction, and that, as I pointed out in a subsequent
19 letter brief, there's -- California doesn't adopt the
20 collateral bar rule. And therefore, he has a check and
21 balance in this case. Under *People v. Gonzales*, 12
22 Cal.4th 805, the collateral bar rule has no application in
23 the State of California. So in the unlikely event that
24 Mr. Tory was engaged in speech praising Mr. Cochran, one,
25 and two, in the -- in the more unlikely event that someone

1 was going to attempt to cite him for contempt for engaging
2 in protected speech, he could contest, under First
3 Amendment grounds, the enforcement of this injunction in
4 the State of California because the collateral bar rule
5 has no impact.

6 JUSTICE KENNEDY: Well, I'm -- I'm baffled by
7 that. What you're saying is that the injunction -- we're
8 just all wasting our time? The injunction doesn't mean
9 anything?

10 MR. COLE: No, no, no, no. Justice Kennedy, all
11 I'm saying is --

12 JUSTICE KENNEDY: I -- I fell off the track
13 here.

14 MR. COLE: All I'm -- all I'm saying is that if
15 the collateral bar rule was in effect, you would waive
16 your right to contest. You don't have a right to contest
17 the constitutionality of the injunction on First Amendment
18 grounds or constitutional grounds when it's seek to be
19 enforced against you. That's not a defense in a contempt
20 proceeding. California does not adopt that rule.
21 Therefore, Mr. Tory can always -- if he is engaged in
22 protected speech, he can easily contend --

23 JUSTICE KENNEDY: Oh, yes, but he's different
24 from other citizens because he's at -- he's at risk of a
25 contempt citation.

1 MR. COLE: I don't dispute that.

2 JUSTICE KENNEDY: I mean, his speech is being
3 chilled with -- with respect to protected speech.

4 MR. COLE: But there's nothing unusual --

5 JUSTICE KENNEDY: So the collateral bar rule
6 doesn't help you at all because he's subject to a contempt
7 citation.

8 MR. COLE: He's subject to it, but there's a
9 check and balance there in terms of when you balance, the
10 potential remedy for Mr. Cochran -- what -- what is going
11 to give Mr. Cochran the remedy he needs? And if we
12 balance that against the -- the breadth of this
13 injunction, I think we have to look at -- one of the
14 biggest concerns about prior restraints, when analyzed in
15 terms of injunctions, is the collateral bar rule.

16 JUSTICE BREYER: But it would be so easy. I
17 mean, it's virtually no burden. I take it what you're
18 saying is that this injunction in paragraph 2 at its heart
19 is aimed at in public forums, keeping insults suggesting
20 he was a crook against Johnnie Cochran unless you pay me
21 \$10,000. Then I'll stop. Okay? Now, at its heart,
22 that's what it's aimed at.

23 MR. COLE: That's exactly --

24 JUSTICE BREYER: And you are saying if in fact
25 it's ever enforced outside that heartland, you can have a

1 defense. It would violate the First Amendment.

2 But since it's so easy just to write those words
3 we just said right in paragraph 2, why shouldn't the judge
4 have to do it? It's so easy. Say this is aimed at the
5 heartland just as I said it and you said it, and it
6 doesn't apply outside of it.

7 MR. COLE: And I have no dispute with that,
8 Justice Breyer. I agree that was the whole purpose for
9 the injunction. That's the basis of the injunction. And
10 you could always remand for further proceedings,
11 consistent with any opinion you would write, that the
12 injunction has to be tailored to -- to deal with
13 defamatory conduct, which is designed to extort or with
14 the intent to extort. And I --

15 JUSTICE SCALIA: That's what he's arguing.
16 You're -- you're conceding that it's overbroad.

17 MR. COLE: I'm saying if this Court -- well, I'm
18 gleaning the impression that this Court thinks it's
19 overbroad.

20 JUSTICE SCALIA: Ah, you're very perceptive.

21 (Laughter.)

22 MR. COLE: And having gleaned that perception,
23 I'm trying to suggest that, number one, there was no
24 attack on paragraphs 1 and 3, and now we're focused on
25 paragraph 2. And paragraph 2 can be tailored, as you have

1 indicated, Justice Scalia, I think consistent with First
2 Amendment issues.

3 And I think it's important to point out that if
4 we take away injunctive relief in a defamation action in
5 this day -- modern age --

6 JUSTICE STEVENS: You're sort of saying the
7 opposite of what your opponent said. If we take it away,
8 has it ever been there?

9 MR. COLE: It's never been there.

10 JUSTICE STEVENS: What are we taking away?

11 MR. COLE: I -- I agree it's never -- you've
12 never found it there and you've never said it can't be
13 there.

14 JUSTICE BREYER: How does California work in
15 that respect? Because what I've been thinking of in my
16 mind is that maybe we shouldn't decide this in terms of
17 State law boxes, that California seems to have an action.
18 Let's call it a buzz action to get away from words. And
19 what that action is it's a defamation but a certain kind.
20 It's defamation accompanied by extortion. And when you
21 have defamation accompanied by extortion -- call it
22 whatever you want -- an injunction is proper in these
23 circumstances.

24 Now, can we decide it in such a way that we're
25 not talking about all defamation actions? We are talking

1 about this beast in California which uses the word
2 defamation but also finds injunction and therefore issues
3 -- also finds extortion and therefore issues an
4 injunction.

5 MR. COLE: Yes, I think that you could limit the
6 injunction to defamatory speech of a similar nature
7 designed to extort.

8 JUSTICE SCALIA: Would -- would that make Mr.
9 Cochran happy? What -- what's the big deal about
10 extortion? I mean, suppose this same conduct occurs in
11 the future, but he doesn't say I'll stop if you give me a
12 lot of money. He just pickets every day and says Cochran
13 is a shyster, don't do any business with Cochran. Do you
14 think Mr. Cochran would be any -- any happier simply
15 because the guy says I'll -- hasn't said I'll stop if you
16 pay me \$10,000?

17 MR. COLE: No, and I think that would be subject
18 to the same injunctive relief. I think this case is
19 unique with the extortion element, but I don't disagree,
20 Justice Scalia, that that is why any decision that says
21 injunctions in defamation actions would be improper. I
22 think people would start defaming with impunity.

23 JUSTICE SCALIA: You've got to give us some
24 line. I mean, the only reason we're grabbing onto
25 extortion is that -- that there's reluctance to say you

1 can issue injunctions in all defamation actions. Now,
2 what -- what limitation do you want to place upon the
3 ability to issue an injunction if it is not defamation
4 combined with extortion?

5 MR. COLE: I don't think you need to place a
6 limitation other than you can enjoin the defamation
7 conduct. Take, for example, the Internet. A posting goes
8 on of a -- of a business that -- a startup company. It
9 can't -- damages of -- for a startup company -- they're
10 very difficult to prove.

11 JUSTICE BREYER: But then you run into the
12 public figure. I mean, that's a much more dangerous kind
13 of rule of law, isn't it? I mean, a pure defamation
14 action against a public figure, which they want to say
15 this is. You can write all kinds of things about public
16 figures. People can and do, for better or for worse. Do
17 -- is there any authority for issuing in a pure defamation
18 action an injunction?

19 MR. COLE: There's no authority, but there's no
20 authority that says you can't do it.

21 But what I am suggesting is in -- is in a pure
22 defamation action that's not tied to any specific wrongful
23 conduct, there's no reason why you couldn't enjoin. For
24 example, if you found that a specific item was defamatory
25 on its face, such as a posting on the Internet, the only

1 way to get that posting off the Internet would be to
2 enjoin it because damages aren't going to solve the
3 problem. And if it's -- even if it's purely defamatory,
4 you could restrict it to that purely defamatory posting,
5 similar to -- to the obscenity cases where you've reviewed
6 a film, you found it to be obscene, and then you preclude
7 it. There are procedural safeguards and you preclude it
8 in the future.

9 JUSTICE GINSBURG: But you've just said
10 something that I think that's inconsistent with your
11 earlier presentation. You said you could enjoin that
12 posting. Here you said it wouldn't be effective just to
13 enjoin the particular placards that were used, the
14 particular words because then there would be other words.
15 So the same question could come up with an Internet
16 posting if you had an injunction not simply on what was
17 posted but anything about this particular individual that
18 might be posted in the future.

19 MR. COLE: Well, Justice Ginsburg, I think where
20 that leaves us is you'd have to engage in some sort of
21 balancing about the -- how narrowly tailored the
22 injunction is and does it provide a sufficient remedy and,
23 you know -- and -- and in this -- and what test we would
24 analyze it under, strict scrutiny, intermediate scrutiny,
25 or the Ward test. And -- and I think that in applying

1 those tests, you'd have to come to a balance, and if the
2 balance is that you're going to limit it to a specific
3 type of speech or -- then that -- that would be a -- a
4 reasonable limit, and if it creates a multiplicity of
5 actions, well, so be it. But at least there's a remedy
6 for that posting or postings of a similar nature. So --

7 JUSTICE GINSBURG: Now, you -- you -- to the
8 extent that you're complaining about extortion-like
9 conduct, something else that you drafted -- I'm looking at
10 the complaint on page 7 of the joint appendix. You have
11 identified all defamatory, including with the false light
12 invasion of privacy, but you don't have any claim that
13 looks like blackmail.

14 MR. COLE: If you'd -- if I could direct you,
15 Justice Ginsburg, to page 12 of the joint appendix at
16 paragraphs (j) and (k) of the verified complaint, you will
17 see that we alleged in a verified complaint that he'd
18 engaged in three previous efforts of this same type of
19 conduct, one. And two, paragraph (k), that Tory is in the
20 business of professionally extorting monies from innocent
21 persons and business --

22 JUSTICE KENNEDY: I -- I was going to ask you
23 about that. Were there findings to substantiate the
24 allegations?

25 MR. COLE: Findings to substantiate --

1 JUSTICE KENNEDY: Specifically about the
2 extorting money from the bank and the oil company.

3 MR. COLE: No, Justice Kennedy, there were not.

4 JUSTICE KENNEDY: No findings.

5 MR. COLE: There was some testimony only on one
6 of those issues, which was the oil company. There was no
7 findings on this issue.

8 But then I would refer you to paragraph (k)
9 which specifically refers to extorting of monies. And
10 also in my opening statement, as is reflected in the
11 trial's transcript, the -- the first thing I said is this
12 is speech designed for an improper purpose. It's
13 unprotected speech designed to extort money from Mr.
14 Cochran. That was the whole theme --

15 JUSTICE GINSBURG: But what -- what I mean is
16 could you have -- without using the label defamation, have
17 stated a claim for extortion or blackmail? I'm not
18 looking at your particular allegations but how you
19 described on page 1 of the complaint what you were suing
20 for: libel, libel per se, slander, slander per se, and
21 invasion of privacy.

22 MR. COLE: I think we could have pled extortion
23 had we chose to. We could have pled inference with
24 advantageous business relations. We probably could have
25 pled California's --

1 JUSTICE KENNEDY: Does California law require
2 you to label the type of the cause of action or is it
3 notice pleading based on facts?

4 MR. COLE: Notice pleading based on facts, but
5 we do label the causes of action. The -- the point I'm
6 trying to make is whether every cause of action was pled,
7 if the conduct is extortion, which is what the judge
8 implicitly found by findings 20 and 27, that conduct is
9 not protected. And whether we named the cause of action
10 correct in the complaint or we sued for that specified
11 cause of action, doesn't change what it is that we were
12 seeking relief for, which is stopping this man from
13 defaming Mr. Cochran until he was paid money.

14 We attempted to achieve that. We thought we did
15 a fair job in paragraphs 1 and 3, which they don't attack
16 and I agree is not fairly included within the question
17 which has been certified here, nor is an attack on the
18 underlying finding.

19 But we attempted in paragraph 2, broadly I
20 agree, to avoid a multiplicity of actions and to give Mr.
21 Tory other channels of communication other than the public
22 forum where he is engaged in a continuing course of
23 repetitive conduct to defame Mr. Cochran.

24 He -- and -- and this is -- one point that I
25 want to stress. We don't view this injunction as being

1 violated if he went on TV, he went on the radio, he went
2 in the newspapers. We don't view those as public forums
3 under the definition that this Court has provided. Those
4 are not public forums. We are not concerned about that.
5 We do not believe that those events will occur. We did
6 not seek to protect them. So we have given Mr. Tory an
7 unlimited venue to speak, but we said you can't do this in
8 the public forum because of your continuing course of
9 repetitive conduct, 3 years, once a week, 52 times a year,
10 over 150 times, 4 hours a day.

11 And with that, I would submit that while the
12 injunction is broad, I don't believe it's a
13 unconstitutional prior restraint, and to the extent this
14 Court believes it is overbroad, I believe striking
15 subparagraphs (ii) and (iii) of paragraph 2 would solve
16 the problem, or alternatively, that in conjunction with a
17 suggestion that it needs to be narrowed to deal with the
18 speech and conduct in issue.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cole.

21 Mr. Chemerinsky, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF ERWIN CHERMERINSKY

23 ON BEHALF OF THE PETITIONER

24 MR. CHERMERINSKY: Thank you.

25 Justice Breyer kindly invited my thoughts about

1 how an opinion might be written, and there are three
2 different ways not mutually exclusive.

3 One is that this injunction is vastly overbroad
4 for all the reasons that have been identified. Mr. Cole
5 said a couple of things. One, he said that Mr. Tory can
6 go to court and ask for modification of the injunction,
7 but that's what makes this a prior restraint, that Mr.
8 Tory can only speak again if he goes to court and gets
9 permission.

10 Also, he said at the end that Mr. Tory can go
11 before the media. However, under California law, under
12 Damon v. Ocean Hill, the media is defined as a public
13 forum.

14 A second way the opinion could be written is
15 that this for speech protected by the First Amendment.
16 Justice Ginsburg, you asked me at the outset whether
17 that's in the scope of the question presented. Well, it
18 is directly relevant to what Mr. Cole was saying. Because
19 it's all opinion, all hyperbole it is protected by the
20 First Amendment and can't be the basis for an extortion
21 claim.

22 JUSTICE GINSBURG: Yes, but you're asking us now
23 to -- the -- the trial court found there was defamation,
24 and now you want to argue, no, it wasn't defamation. It
25 was mere opinion. I really don't see how that's included

1 in the question presented.

2 MR. CHEMERINSKY: I think it is because it goes
3 to the question whether the injunction is permissible.

4 But I go on to the third way that the opinion
5 could be written, and that's that injunctions are not
6 permissible as a remedy in a defamation case. We agree
7 that if there is a cause of action for extortion, it can
8 have an injunction as a remedy. We agree if the cause of
9 action is for harassment, there can be an injunction as a
10 remedy. But those have specific elements that have to be
11 met. Those elements weren't met in this case.

12 History is clear that injunctions aren't allowed
13 in defamation cases, and also, Your Honor, it's quite
14 important that Mr. Cole even said you can't craft a narrow
15 injunction in a defamation case. Any injunction is either
16 too narrow or too broad.

17 In Near v. Minnesota, this Court said that it
18 was telling that in 150 years of the history of the First
19 Amendment, there had never been an injunction approved by
20 this Court in a defamation case. We're now 70 years later
21 than that. To approve an injunction in a case like this,
22 even though it's called defamation plus extortion, will
23 open the door to injunctions as a routine matter in
24 defamation cases across the country. No --

25 JUSTICE GINSBURG: There have been -- there have

1 been injunctions against harassing conduct, threatening,
2 stalking.

3 MR. CHEMERINSKY: Yes, Your Honor, and we have
4 no objection to injunctions of that sort. What we object
5 to is an injunction as a remedy in a defamation case and
6 an injunction that is directed at speech. That's what the
7 First Amendment prohibits.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Chemerinsky.

11 The case is submitted.

12 (Whereupon, at 11:11 a.m., the case in the
13 above-entitled matter was submitted.)